

No. 44390-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY O. COLE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Thomas McPhee, Judge  
Cause No. 11-1-01612-2

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the charging document in Cole's case omitted an essential element of the charge of first degree trafficking in stolen property.

2. Whether the accomplice liability statute is overbroad such that it violates the First and Fourteenth amendments.

3. Whether the prosecutor committed misconduct during closing argument by misstating the law regarding second degree burglary, specifically incorrectly defining "fenced area."

B. STATEMENT OF THE CASE.

The State accepts Cole's statement of the substantive and procedural facts. Additional facts will be referred to as necessary in the argument portion of this response.

C. ARGUMENT.

1. The charging language for the crime of first degree trafficking in stolen property includes all of the essential elements of the offense.

For the first time on appeal, Cole challenges the information charging her with first degree trafficking in stolen property. The charging language is as follows:

In that the defendant, KIMBERLY OLGA COLE, in the State of Washington, on or about October 15, 2011, as a principal or as an accomplice, did knowingly initiate, organize, plan, finance, direct, manage, or supervise the theft of property for sale to others, and/or did knowingly sell, transfer, distribute, dispense, or otherwise dispose of stolen property to

another person or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

CP 3.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When the charging document is challenged after the verdict, the language is construed liberally in favor of validity. Id. at 360. That is so to prevent sandbagging, where a defendant fails to raise a defect in the charging document before trial, when it could be remedied, but instead waits to challenge it on appeal when the remedy would be an expensive and time-consuming reversal, remand, and retrial. Kjorsvik, 117 Wn.2d at 103.

A charging document must include all essential elements of a crime, statutory or nonstatutory, "to afford notice to an accused of the nature and cause of the accusation against him." Kjorsvik, 117 Wn.2d at 97. An "essential element is one whose specification is

necessary to establish the very illegality of the behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

The court uses a two-pronged analysis to determine the constitutional sufficiency of a charging document challenged for the first time on appeal: 1) do the essential elements appear in any form, or by fair construction can they be found in the charging document; and, if so, 2) can the defendant show that he or she was actually prejudiced by the language of the charging document. Kjorsvik, 117 Wn.2d at 105-06.

The first prong of the test looks to the face of the charging document itself. State v. Tandecki, 153 Wn.2d 842, 849, 109 P.3d 398 (2005). The charging document can use the language of the statute if it defines the offense with certainty. State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). However, the charging document does not need to mirror the language of the statute. Tandecki, 153 Wn.2d at 846.

First degree trafficking in stolen property is prohibited by RCW 9A.82.050(1):

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

“Trafficking” is defined in RCW 9A.82.010(19):

“Traffic” means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

Cole claims that the charging language in her case does not allege that she knowingly trafficked in stolen property. She asserts that the element of knowledge was omitted from a portion of the final alternative method of trafficking. Appellant’s Opening Brief at 17-19. The argument seems to be that the knowledge requirement stopped just before the “or” in the final sentence of the charging language: “did knowingly sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” CP 3. The elements instruction included the element that the defendant knew the property was stolen. CP 40.

Because the defendant is challenging the charging document for the first time on appeal, the court construes it liberally.

Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from the language within the charging document. . . . Thus, when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document.

Kjorsvik, 117 Wn.2d at 104. The charging document is read as a whole according to common sense and including facts that are implied. State v. Nonog, 169 Wn.2d 220, 227, 237 P.3d 250 (2010).

Reading the charging language in this case in a common sense manner, it makes no sense at all that a defendant would be misled into believing that he would be criminally liable if he knew the property that he sold, transferred, distributed, dispensed or otherwise disposed of was stolen, but that there was no requirement that he knew property to be stolen if he bought, received, possessed, or obtained control of stolen property with intent to sell, transfer, distribute, dispense, or otherwise dispose of that property. There is nothing to indicate that the knowledge element was disconnected from the language following the disjunctive “or” in the charging language. One cannot knowingly traffic in stolen property without knowing the property was stolen.

“Knowingly traffic” and “stolen property” are not so disconnected from each other as to make it appear one could be convicted without knowledge of both. The charge is not “trafficking in property,” and the language is sufficient to put a defendant on notice that knowledge that the property was stolen is an element of the offense.

Nor was Cole misled. The jury instruction included the element of knowledge that the property was stolen. CP 40. Nothing in the record indicates that Cole was surprised by the jury instructions, misunderstood the charging language, or was in any way prejudiced by it, nor does she claim any prejudice.

This charging language was constitutionally sufficient.

2. The accomplice liability statute does not violate the First Amendment.

Cole argues that the accomplice liability statute is so broad that it criminalizes pure speech that is protected by the First and Fourteenth Amendments. Two divisions of the Court of Appeals have rejected this argument, but the appellant maintains that those decisions are poorly reasoned and incorrectly decided. Appellant’s Opening Brief at 12-16; State v. Coleman, 155 Wn. App. 951, 231 P.3d 212 (2010); State v. Ferguson, 164 Wn. App. 370, 264 P.3d

575 (2011). Her argument is that the accomplice liability statute is overbroad because it criminalizes speech made with the intent to promote or facilitate a crime without limiting that speech to imminent lawless action.

Statutes are presumed constitutional and the burden is on the challenger to prove them unconstitutional beyond a reasonable doubt. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). A First Amendment challenge requires an analysis of the language of the statute without reference to the facts of the particular case. Seattle v. Webster, 115 Wn.2d 635, 639, 802 P.2d 1333 (1990).

The accomplice liability statute is codified as RCW 9A.08.020 and reads, in pertinent part, as follows:

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of another person in the commission of a crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

The statute does not define "aid". It is, however, defined in WPIC 10.51, included in this record in Jury Instruction No. 9, as "all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." CP 29.

Cole cites to the seminal Supreme Court case of Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), which articulated the following principle:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . "[T]he mere abstract

teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”

Id. at 447-48, internal cites omitted.

A statute is overbroad if it includes constitutionally protected speech, even though it may also prohibit unprotected speech. The First Amendment overbreadth doctrine may be invoked to invalidate a law only if that law is “substantially overbroad.” Webster, 115 Wn.2d at 640-41 (citing to Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)).

Cole’s objection to the holdings in Coleman and Ferguson lies in her claim that those cases rely on an analysis of the First Amendment as it applies to conduct. While Coleman does rely significantly on Webster, which dealt with a statute prohibiting the intentional obstruction of traffic, by analogy the Coleman court found that the accomplice liability statute requires the same mens rea, “to aid or agree to aid in the commission of a specific crime with knowledge the aid will further the crime.” Coleman, 155 Wn. App. at 961. The court in Ferguson adopted the rationale of Coleman. Ferguson, 164 Wn. App. at 376.

Even if one leaves Coleman and Ferguson out of the analysis, Cole still fails to establish that the accomplice liability statute, as interpreted by WPIC 10.51, is overbroad. First, the included protected speech must be substantial compared to the speech legitimately proscribed. “We will not invalidate a statute simply because ‘there are marginal applications in which . . . [it] would infringe on First Amendment values.’” , citing to Parker v. Levy, 417 U.S. 733, 760, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974). While that equation is not easily defined, “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient” to make it overbroad. State v. Immelt, 173 Wn.2d 1, 11, 267 P.3d 305 (2011). There must be a reasonable risk that the statute significantly infringes on the First Amendment rights of persons not part of the case at issue. Id.

Words used to aid in the commission of a crime must pertain to the specific crime charged, not to general criminal activity. State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005). “Aid” is defined as “assistance.” CP 29. It is not reasonable to contemplate that the defendant is assisting in some general or hypothetical crime, but rather a specific, concrete crime occurring at the time or planned in the near future. Language which assists in the commission of a

crime can be considered part of the crime itself. Words which express intent or motive are not protected by the First Amendment, and words assisting in a crime can easily fall into that category. State v. Halstein, 122 Wn.2d 109, 125, 857 P.2d 270 (1993).

In United States v. Mendelsohn, 896 F.2d 1183 (9<sup>th</sup> Cir. 1990), the defendants had provided to an undercover police officer a computer disk containing software that was used for illegal bookmaking. The court rejected an argument that the information on that disk was protected speech. “Where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.” Id. at 1185 (quoting United States v. Freeman, 761 F.2d 549, 552 (9<sup>th</sup> Cir. 1985)). “No first amendment defense need be permitted when the words are more than mere advocacy, ‘so close in time and purpose to a substantive evil as to become part of the crime itself.’” Mendelsohn, 896 F.2d at 1186 (again quoting Freeman, 761 F.2d at 552). Language which assists in a crime is essentially part of the crime itself, a conclusion supported by the fact that accomplices incur the same culpability as the principals. Instruction No. 9, CP 29.

The accomplice liability statute does not run afoul of the First Amendment, and this claim should be denied.

3. The prosecutor's error in rebuttal argument regarding the definition of "fenced area" was not misconduct and was not prejudicial. However, because the evidence was insufficient to prove that the property in question was a fenced area, Cole's second degree burglary conviction should be reversed and remanded for retrial.

Cole argues that the prosecutor engaged in prosecutorial misconduct by misstating the law regarding second degree burglary. Appellant's Opening Brief at 19-23. While the prosecutor's statement was technically accurate, she did indicate the jury could convict on one of the alternative means for committing burglary in the second degree for which there was insufficient evidence.

Second degree burglary is committed by entering or remaining unlawfully in a building other than a vehicle or a dwelling with the intent to commit a crime therein. RCW 9A.52.030(1). A building is defined in RCW 9A.04.110(f) as:

"Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

The jury was given Instruction No. 14: “Building, in addition to its ordinary meaning, includes any fenced area or cargo container.” CP 30.

“Fenced area” is not further defined by statute. Few Washington cases have addressed the subject. In State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009), the Supreme Court resorted to the common law to define a fenced area as “limited to the curtilage of a building or structure that itself qualifies as an object of burglary (as defined in RCW 9A.04.110(5)). The curtilage is an area that is completely enclosed either by fencing alone or . . . a combination of fencing and other structures.” Id. at 580. The fenced area at issue in Engel was the business premises of an asphalt company. It covered seven or eight acres and included several buildings and a large yard. There was a fence along the front of the property facing the road, as well as a section of fence between piles of rock and gravel. The remainder of the property, about two thirds of the perimeter, was not fenced but was bordered by sizeable drop-offs, topographical features that prevented access to the yard. Id. at 574. The court found that this property did not constitute a fenced area and reversed. Id. at 580-81.

The property in this case is very similar. There was a fence along the property bordering the main access and a chair with a “no trespassing” sign was placed blocking the back driveway onto the property. Apparently trees or other features prevented access in other places. RP 109, 307.<sup>1</sup> William White testified that he had put a cable across a back gate “so that the whole property was secure and nobody could get on.” RP 305. However, there was no other evidence presented that indicated the property was fenced in the manner described in Engel.

Cole frames the issue in terms of prosecutorial misconduct, because the prosecutor, in rebuttal, said:

There is no question that they entered a building, any of them. The carport constitutes a building, the storage container constitutes a building, and the fenced area, that yard, it does constitute a building by definition. There’s nothing in your instructions that says the fencing must touch all the way around, it says fenced area and that’s it, and I submit to you that’s exactly what occurred here.

RP 808-09.

While it is true that the fencing need not touch all the way around, the property must be entirely enclosed, and there was no evidence that this property was enclosed completely. If the

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<sup>1</sup> All references to the Verbatim Report of Proceedings are to the five-volume trial transcript.

prosecutor mistakenly interpreted the statute, she was not the only one. Neither Cole, nor any other of the three defendants tried with her, objected to either the jury instruction or the argument, and none of them challenged the “fenced area” language. Garcia did move to dismiss, after the State rested, for lack of sufficient evidence of burglary, but her argument was lack of evidence of intent, not lack of evidence that the property was a fenced area constituting a building. RP 508-09.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id. A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative

instruction to the jury.” Id. The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor’s remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) “Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” Id., at 85. While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel’s arguments. Id., at 87. See *also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State’s case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000).

Because Cole did not object at trial or request a curative instruction, she arguably waived any claim that the property was

not a fenced area. A curative instruction could easily have cured the error. The State agrees, however, that Cole's conviction for second degree burglary should be reversed and remanded, but not on the basis of prosecutorial misconduct.

The cargo container and the carport both do qualify as buildings under the definition, and Cole has not claimed otherwise. The State offered the cargo container, carport, and fenced area as the three areas that Cole unlawfully entered or remained, but there was insufficient evidence to prove that the fenced area was completely enclosed. A verdict must be unanimous, and a general verdict of guilty of a crime can stand only if there is sufficient evidence of all of the alternatives. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Here there is no way of knowing whether any of the jurors relied on the fenced area alternative instead of either of the other two, and therefore Cole's conviction for second degree burglary should be reversed and remanded for retrial.


Evidence adequately supported two of the possible ways Cole was charged with committing burglary; dismissal of the charge is not the remedy. The case should be remanded for retrial. State v. Klimes, 117 Wn. App. 758, 760-61, 73 P.3d 416 (2003) *overruled*

*in part on other grounds, State v. Allen, 127 Wn. App. 125, 137, 110 P.3d 849 (2005).*

#### D. CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Cole's convictions for first degree trafficking in stolen property and third degree theft, and remand for retrial the conviction for second degree burglary.

Respectfully submitted this 23<sup>d</sup> day of August, 2013.

  
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# THURSTON COUNTY PROSECUTOR

**August 23, 2013 - 8:49 AM**

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